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MAR 25 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
October Term, 1948
No. 559

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED, and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSEN, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

PETITIONER'S REPLY BRIEF.

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NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

PETITIONER'S REPLY BRIEF.

Statement.

Petitioner submits this brief in reply to certain misconstructions of its position, contained in the briefs for respondents Gullberg and A. Cimpi Express Lines, Inc.

POINT I.

Respondents have overlooked the basic premise that decision of the federal question was prerequisite to determination of the questions cited by each of them.

In their respective briefs herein respondents have made light of petitioner's contention that a federal question is involved. Both have completely lost sight of the fact that the federal question was necessarily decided prior to determination of the point which each presents as the main issue of the case.

In the Cimpi brief it is argued that petitioner has abandoned its original position (namely, that at the time of the accident the trailer insured by petitioner was hauled by a tractor not insured by petitioner, that the exclusion clause of the policy providing for just such a situation was effective, and that no liability attached to petitioner) in favor of the federal question stated in the petition. Such is not the case. This is still the basis of petitioner's case. It is the foundation for the federal question. This respondent has apparently lost sight of the sequence of events leading

from this basic fact to the federal question which petitioner asks this Court to decide, namely:

1. Petitioner's policy of insurance contained an exclusion clause providing in substance that it was ineffective unless both tractor and trailer involved in any accident were covered by like insurance with it.

2. This exclusion was a part of the contract between the petitioner-insurer and the insured and operated to restrict the petitioner's liability, unless—

3. The exclusion clause was rendered ineffective;

4. The Court of Appeals rendered this clause ineffective by holding that the policy was a "required policy" under the rules of the Public Service Commission of the State of New York.

This sequence leads directly from the original ground of disclaimer to the present point of argument, namely, that the Public Service Commission had no right to require this policy of a carrier engaged in an interstate operation.

The attorney for respondent Gullberg opens his discussion of this point with a most misleading quotation from the petition (brief of respondent Gullberg, page 9). Obviously petitioner would not expend time, effort and money in asking this Court to review this case, only to concede in opening that the case is not reviewable. Suffice it to say that the three asterisks appearing just before the final sentence quoted represent the better part of two complete paragraphs and that the final sentence quoted refers to a wholly different proposition than that quoted immediately preceding it.

POINT II.

The cases cited in the brief of respondent Gullberg do not preclude review of this decision by this Court.

On this point respondent has cited two distinct lines of decisions of this Court denying review in specific cases.

First are those holding it essential to the jurisdiction of this Court that it appear affirmatively from the record that the federal question was presented to the highest court of the state, was decided by it, and that such decision was necessary to the determination of the cause.

Second are those holding that this Court will not review the decision of a state court if that decision may be adequately supported on a non-federal as well as on a federal ground.

Petitioner disputes neither the existence nor the validity of these rules. On the contrary, petitioner in its petition and brief cited many of these cases and demonstrated why the case at bar conforms to the pattern laid down by the court in those cases for cases subject to review.

To affirmatively appear from the record, it is not necessary that the federal question be stated in so many words as such. It is necessary only that this Court be able to discover from within the pages of the record itself the federal question, its decision, and the necessity of its decision to the determination of the cause.

The application of this rule to the instant case may be outlined as follows:

1. The exclusion clause in the insurance contract would have been effective had not the policy been held a required policy under the New York statute.

2. The policy could not have been a required policy unless the Public Service Commission had the right to require it.

3. The Court of Appeals could not have so held without holding the State Public Service Commission to have the power to impose such a requirement upon the interstate carrier involved.

The decision against insurer-petitioner could rest on no non-federal ground. Only a decision in favor of petitioner could so rest.

To reach its decision against petitioner, the Court had to hold either (1) interstate commerce was not involved (which would be contrary to the fact and would in itself constitute a federal question), or (2) that the New York Public Service Commission had authority to regulate an interstate carrier operating within its territorial jurisdiction to the extent of requiring it to comply with its insurance requirements.

Petitioner has never contended that a carrier may not insure itself against liability in excess of the amounts prescribed either by the Public Service Commission or by the Interstate Commerce Commission. It does contend that insurance in excess of statutory amounts is governed by the terms agreed upon by the insurer and the carrier and not by terms imposed by statute. There is no question but that if the vehicles involved in this accident were the two

vehicles insured by petitioner, used together as provided by the terms of the policy, petitioner would have been bound to pay the judgments to the extent of its policy limits and would have paid them without protest.

Respondent has likewise speculated as to the dire consequences which might follow if petitioner's contention that the carrier was engaged in interstate commerce at the time of the accident is to be sustained. Even though such should ensue (and petitioner sees no reason for believing that they will), petitioner submits that the cases cited in its petition showed unmistakably that this Court has many times declared shipments of the character transported by the carrier on this occasion to be Interstate Commerce, and that regulatory powers of the respective states over such interstate shipments within their borders are limited to those cases wherein neither the Interstate Commerce Commission nor any other federal regulatory body has seen fit to establish regulations such as exist in the instant case.

Respectfully submitted,

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